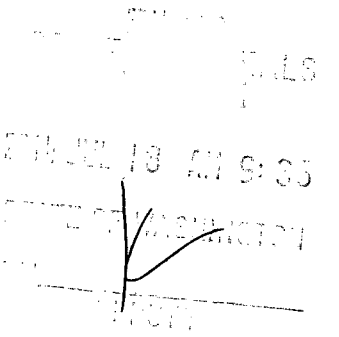

No. 45604-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN R. TONEY,

Appellant,

v.

KEVIN T. MITCHELL and KIMBERLY S. MITCHELL,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

In this nuisance action, plaintiff, a former neighbor of defendants in a rural section of Cowlitz County, sought to recover damages for alleged personal injuries from defendants' use of firearms. On the first day of trial, the trial court granted several of defendants' motions *in limine*, which, as relevant here, resulted in the exclusion of plaintiff's causation witnesses for his personal injury allegations. Because plaintiff could not prove his personal injury claim, the trial court granted defendants' motion to dismiss.

II. ANSWERS TO PLAINTIFF'S ASSIGNMENTS OF ERROR

No. 1: The court should not consider plaintiff's claim of error; but if it does, the trial court properly decided not to apply the standard of *Frye v. United States*, 293 F. 1013 (1923) when considering the admissibility of plaintiff's proffered expert testimony on the issue of causation in support of his injury claims.

Nos. 2 & 3: The trial court properly exercised its discretion in excluding the testimony of plaintiff's causation witnesses: plaintiff, Dr. Joseph L. Davis, and Dr. R. Sterling Hodgson.

No. 4: The court should not consider plaintiff's claim of error; but if it does, plaintiff has not demonstrated trial court bias or prejudice.

No. 5: The court should not consider plaintiff's claim of error; but even if it were inclined to do so, plaintiff has not articulated any discernible error.

A. Issues Pertaining to Plaintiff's Assignments of Error

No. 1(a): Did plaintiff fail to preserve his first assignment of error by not requesting a *Frye* hearing at the time of trial?

No. 1(b): Did plaintiff waive his first assignment of error by failing to offer any supporting legal argument or references to the record?

No. 1(c): Should the trial court have applied the *Frye* test when the proffered expert testimony was not based upon novel scientific evidence?

Nos. 2 & 3: Did the trial court properly exercise its discretion in excluding the testimony of plaintiff's expert witnesses on his personal injury claim where the proffered testimony did not establish causation to a reasonable degree of medical certainty?

No. 4(a): Did plaintiff fail to preserve his fourth assignment of error by not raising the issue of bias or prejudice at trial?

No. 4(b): Did plaintiff waive his fourth assignment of error by failing to offer any legal argument and/or citations to supporting legal authority?

No. 4(c): Did plaintiff demonstrate bias or prejudice of the trial court by his general reference to a single page of the record?

No. 5(a): Did plaintiff fail to preserve his fifth assignment of error by not raising his "issues" at trial?

No. 5(b): Did plaintiff waive his fifth assignment of error by failing to offer any legal argument, citations to supporting legal authority, and/or references to the record?

III. STATEMENT OF THE CASE

A. Statement of Facts[1]

In 2005, defendant Kevin Mitchell constructed on his property a shooting stand and target to sight-in his rifles before hunting. CP 114 at 19-21. Starting in 2007, on multiple occasions, plaintiff called the Cowlitz County Sheriff's Department to complain of allegedly unsafe shooting, harassment and loud firearm noise from defendants' property. *Id.* at 20. Plaintiff made similar complaints to the Cowlitz County Department of Building and

[1] Plaintiff's Statement of the Case is filled with "facts" that are irrelevant to plaintiff's assigned legal error, are presented from his perspective based on his assumptions and suppositions, and are not—and cannot be—supported by citations to the record. RAP 10.3(a)(5) (requiring the Statement of the Case to include references to the record for each factual statement).

Planning. *Id.* Each department responded, conducted investigations of plaintiff's complaints, and found that defendants' use of firearms and any resulting noise complied with the law. *Id.*

In 2007, plaintiff and defendant Kevin Mitchell each filed anti-harassment petitions in district court, against each other. In both cases, the court found in favor of defendant Kevin Mitchell. *Id.*

B. Statement of Proceedings

On November 22, 2011, plaintiff filed an amended complaint for damages in Cowlitz County Superior Court. CP 12 at 1-11. Plaintiff alleged a total of sixty-five incident dates between October 8, 2008 and November 7, 2011. CP 12 at 6-7. Plaintiff alleged that, on each of these dates, defendants' use of firearms caused him hearing, heart, and stress-related injuries. CP 115: Ex. 12 at 5-6. On defendants' motion to dismiss for failure to state a claim, the trial court concluded that plaintiff had stated a single claim of nuisance. CP 114 at 20-21; CP 115 at 64-65, Ex 8. Thereafter, defendants denied plaintiff's allegations. CP 114 at 19-20.

The case went to trial on September 17, 2014. CP 114 at 19-20. Before jury selection, the trial court heard defendants' motions *in limine*. RP 63. Defendants' Motion No. 5 sought to exclude the expert testimony by plaintiff; Motion No. 6 sought to

exclude the videotaped perpetuated expert testimony of Dr. Joseph L. Davis; and Motion No. 7 sought to exclude the videotaped perpetuated expert testimony of Doctor R. Sterling Hodgson. CP 127; 114 at 22-25. While the basis for each motion was slightly different, the court concluded that the proffered expert testimony was inadmissible due to each witness's inability to provide an admissible opinion on causation to a reasonable degree of certainty.[2] RP 36-44, 71-74, 76-77.

Citing several Washington cases in support of their Motion No. 5, defendants argued that plaintiff should be prohibited from testifying concerning the cause of his alleged injuries because he was not a medical doctor and his alleged injuries were outside the scope of his former profession as a chiropractor. RP 42; CP 114 at 22-23. In response, plaintiff argued that he was qualified to state his opinion concerning the cause of his hearing, heart, and stress-related injuries due to his "knowledge and understanding of things," specifically, research articles, referrals he made as a former licensed chiropractor, a Basic Science Certificate and his education

[2] Plaintiff's Exhibits 1, 2, 3, and 4, referenced at Page 11 of the "Second Ammended Opening Brief of Appellant [*sic*]," are not identified in the Transcript of Clerk's Papers and not attached to plaintiff's brief. Defendants move to strike these exhibits.

and experience as a chiropractor. RP 36-44, 64; CP 114 at 22-23; CP 127 at 174-177. The trial court granted defendants' motion, reasoning that plaintiff's prior license to practice chiropractic care in Washington precluded him from testifying on the cause of his alleged personal injuries. RP 36-44, 64.

As to Motion No. 6, defendants argued that Dr. Joseph L. Davis, MD, plaintiff's primary care doctor, should not be allowed to testify on the issue of causation because he could not opine to a reasonable degree of medical certainty that defendants' conduct more likely than not caused plaintiff's alleged hearing, heart and stress-related injuries. RP 64-68; CP 114 at 23-25. In response, plaintiff argued that Dr. Davis's opinion could be received as evidence under *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011), which purportedly provided a lower standard as to the admissibility of medical expert opinions. RP 69-71. In regards to plaintiff's allegations of hearing, heart and stress-related injuries, Dr. Davis's testimony revealed that, as far as causation, he could not provide an opinion based on a reasonable degree of medical certainty. CP 115 at 47-50, Ex. 4. He could state only that plaintiff's alleged injuries were theoretically possible. *Id.*

> Q: Would you agree it is possible in theory, but in fact you can't give us an opinion on what caused his heart attack that day? Is that accurate?
>
> A: Well, his heart attack was caused by a clot that basically caused a blockage in the artery. So yes, that was there. Now, yeah, did the stress contribute to that? It is certainly possible that it did. But, yeah.
>
> Q: So like the hearing and the PTSD examples, it is another "might have" or "could have" situation?
>
> A: Yes.

Id. at 50.

The trial court granted defendants' motion on the ground that, because Dr. Davis could not state an opinion on causation with reasonable medical probability, his proffered testimony was unhelpful, confusing, and as a result, inadmissible.[3] RP 70-74.

As to Motion No. 7, defendants argued that plaintiff's otologist R. Sterling Hodgson should not be allowed to testify about the cause of plaintiff's alleged hearing loss because he could not provide an opinion, based on a reasonable degree of medical certainty, that defendants' use of firearms caused plaintiff's alleged hearing injury. RP 74, CP 114 at 25. Plaintiff argued that Dr.

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[3] As confirmed by the perpetuation deposition transcript of Dr. Davis and the trial court's decision on defendants' motion, the court misspoke when commenting that Dr. Davis used the conditional language of "probably caused." RP 73; CP 115 at 47-50, Ex. 4.

Hodgson, like Dr. Davis, was not familiar with the meaning of causation and his testimony was only "a matter of semantics." RP 74-76. With respect to the cause of plaintiff's alleged hearing loss, Dr. Hodgson's testimony revealed that he could state only that the gun noise "might have" or "could have" caused plaintiff's hearing loss. CP 115 at 51-54, Ex. 5. Dr. Hodgson testified that he could not say, based on a reasonable degree of medical certainty, that the gun noise from defendants' property more likely than not caused plaintiff's hearing loss:

> Q: However, you cannot say based on a reasonable degree of medical certainty that gun noise from my clients' property probably caused his hearing loss?
>
> A: I cannot say that without further information, correct.

Id. at 53.

The trial court granted defendants' motion and reasoned that, because Dr. Hodgson could not state to a reasonable degree of medical certainty that defendants' gun noise caused plaintiff a hearing loss, Dr. Hodgson's testimony was unhelpful to the jury and inadmissible. RP 76-77.

The trial court also granted defendants' motions *in limine* numbers 8 and 9, to exclude all evidence of plaintiff's alleged

personal injuries and property damages. CP 114 at 25-26; CP 127; RP 78-95.

Defendants then moved to dismiss plaintiff's amended complaint on the ground that plaintiff admittedly had no other evidence on causation. RP 95-97. In response, plaintiff conceded that, in light of the court's rulings on defendants' motions *in limine*, he had no legal theory of recovery, but he argued that the court should not dismiss his case because the "interest of justice is not going to be served." RP 96.

Judgment was entered on September 30, 2013. CP 178-180. On October 29, 2013, plaintiff timely filed a notice of appeal.

IV. SUMMARY OF ARGUMENT

This court should not consider plaintiff's first assignment of error concerning a *Frye* hearing. Not only did plaintiff fail to request such hearing from the trial court, his brief on appeal fails to include any argument and/or references to the record, both of which are required by the court's rules. In any event, the trial court correctly concluded that the *Frye* standard did not apply to defendants' motions to exclude the proffered expert testimony of plaintiff, Dr. Davis, and Dr. Hodgson because the testimony did not constitute novel scientific evidence.

Concerning plaintiff's second and third assignments of error, the trial court properly exercised its discretion in granting defendants' motions *in limine* to exclude the testimony of plaintiff and his two medical doctors because none of them could provide admissible testimony on the issue of whether defendants' alleged firearm noise caused plaintiff's alleged injuries. The trial court correctly concluded that plaintiff was unqualified as a former chiropractor and that Drs. Davis and Hodgson could not state their opinions on causation to a reasonable degree of medical certainty.

With respect to the fourth assignment of error, plaintiff failed to alert the trial court of any purported bias or prejudice, and on appeal he offers no legal argument or citations to legal authority to support the claimed error. This court thus should not consider it. Nevertheless, even if it addresses the assignment of error, this court should conclude that plaintiff's mere reference to a single page of the record fails to establish bias or prejudice by the trial court.

Similarly, this court should not consider plaintiff's fifth assignment of error because plaintiff failed to raise his "issues" at trial and has failed on appeal to offer legal argument, citations to

legal authority, and supporting references to the record to establish trial court error.

V. ARGUMENT

A. ANSWER TO FIRST ASSIGNMENT OF ERROR

1. Court Should Not Consider Plaintiff's Claim of Error

Plaintiff appears to assign error to the trial court's decision to not conduct a *Frye* hearing in determining the admissibility of plaintiff's proffered expert witness testimony in support of his injury claims. App. Br. at 12-22; RP 69-74. But plaintiff failed to preserve that claim of error in that he never asked the trial court to conduct a *Frye* hearing or otherwise suggested to the trial court that such a hearing was required. As a general rule, this court will not consider a claim of error raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Accordingly, because plaintiff never asked the trial court to conduct a *Frye* hearing, this court should not consider his claim that the trial court erred in failing to do so.

Even if plaintiff had preserved his claim of error, he has waived any right to have this court consider it. RAP 10.3(a)(6) requires the appellant to include argument and references to the

record in support of each assignment of error. *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004). Plaintiff has failed to do that in support of the first assignment of error. Instead, his brief includes an extensive quotation from a single case, refers generally to the state constitution, and does not include any references to the parts of the trial court record that are relevant to the claim of error.

As evident by the title of his "Second Ammended Opening Brief of Appellant [*sic*]", plaintiff has had three opportunities to file a proper opening brief. In the argument section, seven of ten pages are almost exclusively filled with an improperly cited quotation from *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011). App. Br. at 12-19. Moreover, the brief omits page 16, leaving defendants and the court to guess at the missing content. For any or all of the above reasons, the court should decline to consider plaintiff's first assignment of error.

2. The Trial Court Properly Decided Not to Apply *Frye* When Considering Whether to Exclude Plaintiff's Expert Causation Testimony in Support of his Injury Claims

Even if the court were to consider the merits of plaintiff's first assignment of error, the trial court did not err in deciding not to apply the *Frye* test because the proffered evidence was not novel

scientific evidence.[4] *See In re Detention of Halgren*, 156 Wn.2d 795, 806, 132 P.3d 714 (2006) ("The *Frye* test allows a court to admit novel scientific evidence only if the evidence is generally accepted in the relevant scientific community."). "[T]he *Frye* test is unnecessary if the evidence does not involve new methods of proof or new scientific principles." *Id.*

At trial, defendants moved to exclude testimony of two medical doctors who plaintiff contended supported his allegation that noise from defendants' firearms caused him hearing, heart and stress-related injuries. Neither party contended that the proffered medical testimony was based on novel science. Accordingly, the trial court did not err by not applying the *Frye* test in deciding the admissibility of plaintiff's proffered expert testimony.

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[4] According to the Washington Supreme Court, "[i]t is not clear what standard of review should be applied to a trial court's decision not to conduct a *Frye* hearing." *State v. Gregory*, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006). Defendants assume a *de novo* standard applies. *In re Detention of Berry*, 160 Wn. App. 374, 378, 248 P.3d 592 (2011).

B. ANSWER TO SECOND AND THIRD ASSIGNMENTS OF ERROR

The Trial Court Properly Exercised Its Discretion in Excluding the Causation Testimony of Plaintiff's Witnesses: Plaintiff, Dr. Joseph L. Davis, and Dr. R. Sterling Hodgson

1. Standard of Review

A trial court's evidentiary rulings, specifically including the admissibility of expert testimony under ER 702, are reviewed for abuse of discretion. *Moore v. Harley-Davidson Motor Company Group, Inc.*, 158 Wn. App. 407, 417, 241 P.3d 808 (2010); *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, 232 P.3d 591 (2010). An appellate court "may not substitute its judgment for the trial court" unless "the basis of the trial court's ruling is untenable." *Minehart*, 156 Wn. App. at 463. Trial courts are afforded "broad discretion in deciding whether to admit evidence, including testimony." *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002).

2. The Trial Court Properly Exercised Its Discretion in Excluding Plaintiff's Causation Witnesses' Testimony

i. Plaintiff Not Qualified as an Expert Witness on Medical Causation

Plaintiff contends that the trial court erred in not allowing him to testify on medical causation because he was qualified by his education and experience as a retired chiropractor. App. Br. at 19-21; RP 36-44. The trial court properly exercised its discretion in concluding that plaintiff was not qualified as an expert witness on the issue of medical causation because plaintiff's proffered testimony was outside the scope of his chiropractic education and experience. *Id.*

A witness may be qualified as an expert through "knowledge, skill, experience, training, or education." ER 702; *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990); *Loushin v. ITT Rayonier*, 84 Wn. App. 113, 118, 924 P.2d 953 (1996). A properly qualified expert can provide opinions only within his or her area of expertise. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 104, 882 P.2d 703, 891 P.2d 718 (1994).

A chiropractor can testify as an expert on matters within the scope of the chiropractic profession. *Brannan v. Dep't of Labor &*

Indus., 104 Wn.2d 55, 63, 700 P.2d 1139 (1985). "The practice of chiropractic in Washington includes diagnosis or analysis and care or treatment of vertebral subluxation complex and its effects, articular dysfunction, and musculoskeletal disorders....' RCW 18.25.005(1)." *Loushin*, 84 Wn. App. at 119; see also WAC 296-20-015 (providing that only treatment which falls within the scope and field of the chiropractor's license will be allowed in Washington); *Columbia Physical Therapy, Inc., P.S. v. Benton,* 168 Wn.2d 421, 436, 228 P.3d 1260 (2010) (observing that "chiropractic [is] a distinct practice separate from the practice of medicine, not a mere subset of it"); *Dobbins v. Corn. Aluminum Corp.*, 54 Wn. App. 788, 791, 776 P.2d 139 (1989) (recognizing that chiropractor is not qualified to provide opinion on cause of knee injury because Washington does not include knee injuries within the practice of chiropractic).

The trial court correctly concluded that identification of the cause of plaintiff's alleged injuries (hearing, heart, and stress) was outside the scope of the chiropractic profession. Accordingly, the trial court properly exercised its discretion to exclude plaintiff's testimony as an expert witness on the issue of medical causation.

ii. No Admissible Testimony From Dr. Joseph L. Davis

Plaintiff apparently argues that the trial court erred in not allowing Dr. Davis to testify because, under *Anderson v. Akzo Nobel Coatings, Inc.*, a purportedly lower causation standard applied to the admissibility of expert opinions. App. Br. at 19-20; RP 64-74. The trial court properly exercised its discretion in concluding that Dr. Davis's testimony was legally insufficient because he could not state his causation opinion to a reasonable degree of medical certainty.

As noted in *Anderson*, "medical expert testimony must be based upon a reasonable degree of medical certainty." *Anderson*, 172 Wn.2d 593, 609. Testimony that injuries "might have," "may have," "could have," or "possibly did" result from a defendant's alleged conduct constitutes inadmissible speculation. *Miller v. Staton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961).

In regards to plaintiff's allegations of hearing, heart and stress-related injuries, Dr. Davis testified that he could not provide an opinion on causation to a reasonable degree of medical certainty. CP 115, 47-50, Ex. 4. His testimony thus was limited to speculation; he conceded defendants' conduct theoretically might

have or could have caused plaintiff's injuries. *Id.* Because Dr. Davis could not base his opinion on a reasonable degree of medical certainty, the trial court did not abuse its discretion in excluding his proffered testimony because, without an opinion on causation, his testimony would have been unhelpful and confusing. RP 70-74.

iii. No Admissible Testimony From Dr. R. Sterling Hodgson

For the same reasons as stated above concerning the exclusion of Dr. Davis's testimony, plaintiff apparently contends that the trial court also erred in excluding Dr. Hodgson's testimony. App. Br. at 19-20; RP 74-77. The trial court did not abuse its discretion in concluding that Dr. Hodgson's testimony was legally insufficient because Dr. Hodgson also could not base his causation opinion upon a reasonable degree of medical certainty.

Dr. Hodgson testified that, in his opinion, gun noise "might have" or "could have" caused plaintiff's hearing loss. CP 115 at 51-54, Ex. 5. Dr. Hodgson further testified that he could not say, based on a reasonable degree of medical certainty, that the gun noise from defendants' property more likely than not caused plaintiff's hearing loss. *Id.* at 53.

The trial court thus properly exercised its discretion in excluding Dr. Hodgson's testimony because, without a causation opinion based on a reasonable degree of medical certainty, his proffered testimony was unhelpful. RP 76-77. See *Anderson*, 172 Wn.2d at 609 (medical expert testimony must be based upon a reasonable degree of medical certainty).

C. ANSWER TO FOURTH ASSIGNMENT OF ERROR

1. Court Should Not Consider Plaintiff's Claim of Error

Plaintiff apparently contends that the judgment should be reversed because the trial judge was biased against him. App. Br. at 22; RP 43. The court should not consider the assignment of error for two reasons.

First, plaintiff did not preserve the claim of error by raising it in the trial court. This court thus should not consider the issue, which plaintiff raises for the first time on appeal. *See* RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

Second, even if plaintiff had preserved the claim of error, this court nevertheless should decline to consider it because his brief does not include any legal argument or citation to legal authority to support his conclusory assertion that the court made an unspecified

"disparaging remark" at RP 43 that constitutes "bias, prejudice and lack of knowledge by the court of the laws of Washington State with regards to Chiropractic" care. App Br at 22; *see* RAP 10.3(a)(6); *Bercier*, 127 Wn. App. at 824. As this court has recognized, "We do not consider conclusory arguments that do not cite authority." *West v. Thurston* County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012).

As noted above in reference to plaintiff's first assignment of error, plaintiff has not just technically violated the rules for appellate briefs; he has failed to present an intelligible legal argument to which defendants can provide a meaningful response. The court thus should decline to consider plaintiff's fourth assignment of error.

2. Plaintiff Fails to Demonstrate Bias or Prejudice

Even if the court were to consider plaintiff's fourth assignment of error, that claim fails on its merits because plaintiff has failed to demonstrate any bias or prejudice by the trial court, as the law requires. *See In re Marriage of Farr*, 87 Wn. App. 177, 188, 940 P.2d 679 (1997) (citing RCW 4.12.040; *State v. Cameron*, 47 Wn. App. 878, 884, 737 P.2d 688 (1987)). "Casual and unspecific allegations of judicial bias provide no basis for appellate review, even when asserted by a *pro se* litigant." *Rich v. Starczewski*, 29

Wn. App. 244, 246, 628 P.2d 831 (1981); *see also Cameron*, 47 Wn. App. at 884 (quoting same).

Although plaintiff's brief identifies RP 43 as evidence of the trial court's bias, it fails to set out the objectionable language from RP 43. App. Br. at 22. In fact, there is nothing in the trial court's comments at RP 43 that even arguably reflects bias or prejudice. All that is evident is that the trial court ruled against plaintiff. This court thus should reject plaintiff's fourth assignment of error.

D. ANSWER TO FIFTH ASSIGNMENT OF ERROR

1. Court Should Not Consider Plaintiff's Claim of Error

Plaintiff apparently assigns error to the trial court's dismissal of his complaint when other "issues" were unresolved. App. Br. at 7-10. As stated above in answer to plaintiff's first and fourth claims of error, this court should not consider the merit of plaintiff's fifth claim of error because plaintiff again failed to preserve the issue at the trial court and, in his brief, failed to include argument, supporting legal authority, and/or references to the record. *See* RAP 2.5(a); RAP 10.3(a)(6); *Kirkman*, 159 Wn.2d at 926; *Bercier*, 127 Wn. App at 824; *West*, 168 Wn. App at 187.

If the court reviews the record, it can quickly see that plaintiff not only failed to raise this issue below, he conceded to the trial court that he had no other issues for the court to consider. When asked by the trial court to respond to defendants' motion to dismiss, plaintiff stated that he had no legal theory to support of his case. RP 96. Specifically, when given the opportunity to apprise the trial court and defendants of any issue that prevented the court from granting defendants' motion to dismiss, plaintiff responded by stating that the "interest of justice" required the court to not dismiss his case. RP 96. Although plaintiff apparently now contends that "issues of excessive noise encroachment" remained unresolved and precluded dismissal, App. Br. at 8, 9, this court should not consider that issue, which was never raised below.

In any event, it is not at all clear what legal error plaintiff believes the trial court made that is separate and distinct from those identified in his other assignments of error. Plaintiff simply asserts that "[t]he trial court erred by denying Toney due process under Article 1 section 3 and 10 of the Washington State Constitution and Article ! section 8 and 14 of the U.S. Constitution dismissing the case and not allowing Toney to be heard on the issues before the court." App. Br. at 7. But a generalized reference to the

constitution and other laws is inadequate because defendants and the court cannot identify which particular law is at issue or why plaintiff claims error. As the Washington Supreme Court recognized, "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *Meyer v. University of Washington*, 105 Wn.2d 847, 855 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

In the absence of any legal argument, citations to legal authority, or references to the record to support his fifth assignment of error, defendants cannot identify the claimed error or provide a meaningful response. For any or all of the above reasons, the court should reject plaintiff's fifth assignment of error.

VI. CONCLUSION

For the reasons stated above, the judgment of the trial court should be affirmed.

DATED this 17th day of July, 2014.

COSGRAVE VERGEER KESTER LLP

By _____
Shawn A. Lillegren, WSB #40427
Attorneys for Respondents

CERTIFICATE OF FILING AND SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, the original and one copy of the foregoing Brief of Appellants, postage prepaid, via first class U.S. mail, on the 17th day of July 2014, to:

David Ponzoha
Clerk of the Court
Court of Appeals - Division II
950 Broadway, Suite 300, MS TB-06
Tacoma, WA 98402-4454

I also certify that I mailed, or caused to be mailed, a copy of the foregoing Brief of Appellants, postage prepaid, via first class U.S. mail, on the 17th day of July 2014, to each of the following counsel of record at the following addresses:

John R. Toney
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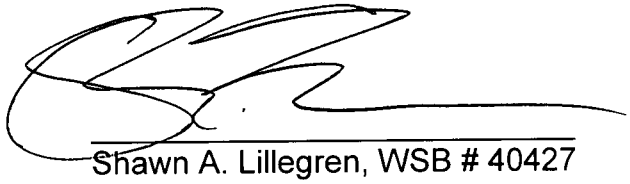
Appellant *pro se*



Shawn A. Lillegren, WSB # 40427